United Nations A/CN.4/493

General Assembly

Distr.: General
4 December 1998
English
Original: English/French/Spanish

International Law Commission
Fifty-first session
Geneva, 3 May–23 July 1998

Nationality in relation to the succession of States

Comments and observations received from Governments

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98-38870 (E) 210199

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I. Introduction

1. On 15 December 1997, the General Assembly adopted resolution 52/156, entitled "Report of the International Law Commission on the work of its forty-ninth session." In paragraph 2 of that resolution, the Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft articles on nationality of natural persons in relation to the succession of States adopted on first reading by the Commission[1] and urged them to submit their comments and observations in writing by 1 October 1998. In paragraph 5 of the resolution, the Assembly invited Governments to submit comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the Commission in deciding on its future work on that portion of the topic "Nationality in relation to the succession of States".

2. By a note dated 31 December 1997, the Secretary-General invited Governments to submit their comments pursuant to paragraphs 2 and 5 of resolution 52/156.

3. As at 4 December 1998, replies had been received from the following nine States (on the dates indicated): Argentina (13 November 1998); Brunei Darussalam (9 October 1998); Czech Republic (14 September 1998); Finland (on behalf of the Nordic Countries) (29 September 1998); France (30 October 1998); Greece (1 September 1998); Guatemala (11 June 1998); Italy (26 October 1998); and Switzerland (27 November 1997). The comments and observations relating to the draft articles on nationality of natural persons in relation to the succession of States are reproduced in section II below, in an article-by-article manner. Those pertaining to the question of the nationality of legal person are reproduced in section III. Additional replies received will be reproduced as addenda to the present report.

II. Comments and observations received from Governments on the draft articles on nationality of natural persons in relation to the succession of States

General remarks

Argentina

Argentina considers that the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted on first reading by the International Law Commission represent a very important contribution to the process of codification and progressive development of international law. An international instrument codifying the legal framework of nationality in relation to the succession of States would supplement the codification work that began with the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

[1] The text of the draft articles with commentaries thereto may be found in the report of the Commission on the work of its forty-ninth session, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), chap. IV.C.2.

Many of the provisions in the draft draw on and codify existing customary rules, thus reflecting the practice of States and the interpretation of doctrine and jurisprudence.

The draft also takes into account more recent trends in international law, particularly in regard to the international protection of human rights.

Czech Republic

The Czech Republic wishes to express its appreciation to the International Law Commission for its efforts in producing the draft articles on nationality of natural persons in relation to the succession of States adopted on first reading and commends the Commission for the quality of the work done so far and for its expediency, which enabled it to elaborate this draft while the subject matter is still topical and truly relevant to the current international situation.

A complete set of draft articles with commentaries, adopted over a single session of the Commission, is to be saluted as an exceptional achievement, made possible to a large extent thanks to the admirable work accomplished during the phase of the preliminary study of the topic and to the untiring efforts of the Special Rapporteur.

By completing this work, the Commission will make a significant contribution to the strengthening of the legal regime of the nationality of natural persons in the case of a succession of States.

The Czech Republic has demonstrated its interest in this subject matter by making a number of oral statements pertaining to this part of the Commission's work over the last few years in the Sixth Committee of the General Assembly. In those interventions, the Czech Republic expressed satisfaction with the main thrust of the work accomplished and presented views aimed at improving the text in some very specific areas. It is now pleased to reiterate most of those views and to present some additional observations, mainly with respect to Part II of the draft.

...

When emphasizing the rights and interests of both States and individuals, the International Law Commission has moved considerably beyond the traditional approach to the law of nationality as a matter primarily within the domain of internal law. The Czech Republic has no difficulties in following the Commission on this path, provided that the balance between the interests of States and those of individuals is maintained.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The Nordic countries commend the International Law Commission for the expediency and efficiency with which it has been able to produce a comprehensive set of articles in the relatively short time since 1993, when the topic was first inscribed on the Commission's agenda. Upon subsequent finalization, and adoption by the General Assembly, the draft articles on nationality of natural persons in relation to the succession of States will constitute a timely contribution to the development of norms in this notoriously difficult field of law. As the Commission notes in its report,[2] it is a field in which guidance is urgently needed.

[2] Ibid., para. (10) of the commentary to the preamble, pp. 27–28.

The Nordic countries welcome the consistent human rights focus throughout the draft. With the development of human rights law since the Second World War, there is an increasing recognition that State discretion in questions relating to nationality must take into account the fundamental rights of individuals. Even though this consideration had been addressed by the Commission right from the beginning, it may not have been followed as consistently in the earlier reports.

The Nordic countries are pleased to note that references are made in several parts of the commentary to the new European Convention on Nationality,[3] which was opened for signature in Strasbourg on 7 November 1997 and which, in their view, constitutes an important standard as regards questions of nationality.

France

France believes that the topic is a useful one. The draft articles supplement the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. But this is a difficult topic to deal with: there are diverging treaty regimes; customary law is unclear; there is little jurisprudence on the subject; and the applicable laws vary according to the category of succession of States concerned, as demonstrated by Part II of the draft.

...

With respect to substance, the draft articles are based on three virtually unassailable principles:

(a) Cases of statelessness resulting from a succession of States are to be avoided. In this respect, article 3 is satisfactory from the viewpoint of both form and substance;

(b) States have a right to seek to prevent successions of States from leading to dual and multiple nationality. Article 7 reflects that aim;

(c) Individuals have a right of option.

However, some assumptions that strongly influence the draft are questionable:

(a) On the whole, the approach taken in the draft is "interventionist", if not "dirigiste". States must not be placed under constraints and sufficient flexibility must be preserved. This is particularly true of everything relating to the right of option. Should the right of option be imposed? It is by no means obvious that the right of option should be promoted and apply everywhere, even though it is in keeping with France's general approach. If such a right is to be granted, what are the consequences of exercising it to be? The question arises as to whether or not the right of option should be combined with an obligation to move and consequently a repatriation obligation on the part of the predecessor State, if the persons concerned opt for the nationality of the predecessor State. Does exercising the right of option imply renunciation of the nationality of origin? In that respect, article 10, paragraph 4, would appear to be open to criticism ... as being too categorical ...

Generally speaking, these problems should be settled by means of bilateral agreements.

(b) The draft establishes a link between the issue of nationality and human rights issues. Article 1 gives the impression that the Commission is seeking to elaborate a text dealing not only with nationality but also with human rights. This article appears to reflect the aim of placing the draft articles in a "human rights perspective". That notwithstanding,

[3] Council of Europe document DIR/JUR (97) 6.

it becomes apparent that the rest of the draft does not draw any specific consequences for the individual from the right that it appears to be granting in article 1. The remainder of the text focuses on the State, not on individuals.

(c) The draft places great emphasis on the principle of the effectiveness of nationality. Even though that principle permeates French law (criteria of domicile and habitual residence), the idea that it exists in this area in international law should not be encouraged. Article 18, paragraph 1, which appears to authorize any State to contest the nationality granted to an individual by another State, is very questionable ...

(d) The draft implies that an individual has the right to choose his or her nationality freely. The rights of States with respect to nationality, as compared with those of individuals, should not be limited unduly. Unlike in the case of the approach reflected in article 20, it is essential not to end up with "forum shopping" for nationality and to avoid the "privatization" of nationality, which disregards the public law status of nationality, a matter on which an individual is not free to decide. States must retain control over the attribution of nationality.

(e) Some provisions do not belong in the draft. For example, article 11 would appear to have major implications regarding the law of residence, which is not in keeping with the aim of the draft. Although there is nothing jarring about this provision in substantive terms, it really has no place in the text. Article 12 seems to have a bias towards the principle of *jus soli*. Article 13, which deals more with succession of States and the law of aliens than with nationality, is not in keeping with the goal of the draft and does not belong in the text.

In addition, some drafting changes are necessary: some provisions are too detailed; the wording of some articles is particularly unclear in certain instances; in some cases, the articles are not adequately linked with each other; and some binding provisions conflict with optional provisions.

Greece

The Government of Greece congratulates the International Law Commission and, in particular, Mr. Václav Mikulka, the Special Rapporteur, for having provisionally adopted, in a short period of time, the draft articles on nationality of natural persons in relation to the succession of States.

Greece, which has undergone a number of cases of succession in its history, has some experience in this matter and, at this preliminary stage, would like to make a few comments of a general nature as well as some specific remarks.

Part I takes more account of recent national solutions than of international law and State practice in this respect. Thus, in this part of the text, we do not find the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession. Articles 4 and 6 move somewhat closer towards this rule, but do not confirm it. However, even though this rule has not been established, it is followed in the specific provisions of Part II, articles 20, 21, 22 (a) and 24 (a).

Furthermore, in Part I we do not find the traditional right of option which the successor State is required to grant within a reasonable period of time from the date of succession to certain categories of persons envisaged in the rule quoted above who have effective links with the predecessor State, or, where applicable, with other successor States (as is the case,

in particular, of persons who, as a result of the succession of States, become minorities within the new State). Such persons must have the right to choose between the nationality of these States and that of the successor State which takes the initiative with regard to the right of option and organizes it. Instead, article 10, paragraph 2, envisages a limited right of option which gives no other choice to persons than that of choosing the nationality of the State granting the right of option. The above-mentioned traditional right should, however, be reflected in a text drawn up by the International Law Commission.

The draft articles should focus more on the succession of States and less on the nationality of natural persons. What interests us here are the effects of the succession of States on the nationality of natural persons. It would therefore be worth excluding from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. This is the case, in particular, with articles 8, 9, 12 and 25, paragraph 2, which could be omitted from the draft. It also applies to article 18, which concerns an extremely delicate matter — control of States in respect of a competence which is strictly linked to their sovereignty — and is liable to raise more problems than it will resolve.

Italy

The Government of Italy would first like to pay tribute to the members of the International Law Commission, and in particular to the Special Rapporteur, for the excellent work they have done on the draft articles on nationality in relation to the succession of States.

The question of nationality and the question of the succession of States are two extremely important aspects of international law which, in addition to giving rise to extensive doctrinal debates, frequently arise in the daily relations between States, as the practice of recent years has demonstrated.

The problem of the nationality of individuals provides a good illustration of the ambiguity of their legal status under international law. The solutions offered for this problem are based on two concerns: above all, to enable a political entity — the State — to control the composition of its population and the extent of its "personal" jurisdiction, but also to accord every individual a degree of freedom of choice in order to avoid violating his or her fundamental rights.

The first concern is one of the classical foundations of the principle of self-determination: the principle of nationalities authorizes a group of people to make initial choices in the context of the birth of a new State. If the State already exists, this principle justifies the essential role of the public authorities in determining the criteria of nationality. The second concern echoes the efforts to recognize the right to a nationality as a fundamental human right. The 1948 Universal Declaration of Human Rights proclaimed this right, but its guarantees are still very fragile. It is sufficient to point out that the 1966 International Covenant on Civil and Political Rights expressly accords the right to a nationality only to children.

Only the State is competent to grant nationality, and every State has that power. This principle is deeply rooted in international practice, both jurisdictional and conventional. What States are free to do, they are equally free to undo. Therefore, the loss or withdrawal of nationality likewise falls within the exclusive competence of the State.

However, this exclusive competence has a counterpart: while it is true that other entities may not contest the criteria for attribution of a nationality, it is equally true that they are not obliged to accept the individual consequences of such attribution. The decisions taken by a State with respect to an individual are not subject to objection by other States, unless the criteria used are not sufficient to justify the granting of rights deriving from a personal qualification: citizenship, in the context of succession of States, must represent a social fact involving real relations.

As to the combined effect of internal rules in this area, there may still be cases in which an individual receives several nationalities or is denied any nationality. Such cases are referred to as conflicts of nationalities. International law seeks to reduce the two phenomena and especially the phenomenon of statelessness, in the light of the tendency to provide increasingly powerful protection for human rights, especially the right to a nationality.

For all these reasons, the effects of a change of sovereignty on the nationality of the inhabitants of a territory involved in a succession is one of the most difficult problems in the law of State succession. It is therefore essential to codify the law in this area since, as has been seen, even if nationality is governed principally by internal rules, it is also a matter which increasingly affects international public safety.

On the basis of the Special Rapporteur's report, the International Law Commission has adopted draft articles on nationality of natural persons in relation to the succession of States which, by virtue of their pertinence and clarity, constitute a valuable product of the Commission's work.

Without eliminating the question of the attribution of nationality from the internal competence of States, the draft articles establish a series of basic principles on the topic, providing extensive codification of current customary international law in order to furnish States with guidelines for standardizing their internal rules and ensuring greater legal certainty.

Italy appreciates the Commission's efforts to strike a fair balance between the rights and interests of individuals and the sovereign competence of States in determining who their nationals shall be, to prevent statelessness, to ensure continuity between different nationalities and to acknowledge the right of every individual to choose his or her nationality, as well as its avoidance of obligatory attribution of nationality, in order to protect minorities in particular.

Switzerland

Switzerland would like to begin by thanking the International Law Commission and its Special Rapporteur, Mr. Václav Mikulka, for having clarified a field which has in the past given rise to much controversy, both theoretical and practical. Although not all of the questions have been answered, their parameters and implications are now much clearer than before ... The set of draft articles, as a whole, appears well designed.

...

The draft articles approved by the Commission on first reading are based on five main principles, the first of which is the need to prevent the succession of States generating new cases of statelessness. The second principle, which complements the first, is that the proposed solutions must be based on an "appropriate connection" between the State and the individual. Since such connections can be identified for almost all the persons concerned, this principle will be unlikely to generate new cases of statelessness. However, it is possible

that an individual may have "appropriate connections" with more than one State concerned, a situation giving rise to the possibility of multiple nationality. This situation leads to a third principle highlighted in the commentary, the principle of the neutrality of the draft articles with respect to the phenomenon of multiple nationality. A fourth principle, which reflects a contemporary trend in State practice, is that it is necessary to try to avoid, as far as possible, the compulsory attribution of nationality. This principle, embodied in draft article 10, can be implemented, *inter alia*, by granting a right of option. The fifth and final principle is that distinctions must be drawn between different factual situations when regulating the consequences of the succession of States in the field of nationality, as in other fields. Questions of nationality can be resolved much more simply, for example, in the case of mergers of States than in other cases. The Swiss Government endorses the above five principles.

...

The Swiss Government wishes to note that the draft articles considered here contain no provisions relating to the peaceful settlement of disputes arising from the interpretation or application of the provisions contained therein. This solution is consistent with the Commission's intention of proposing a draft *declaration*. If the text should ultimately take the form of a *treaty*, it is obvious that it would then be necessary to supplement it with provisions relating to the settlement of disputes.

Form that the draft articles should take

Czech Republic

The draft articles have been given the form of a draft declaration to be adopted by the General Assembly. Although in the previous work of the Commission this form has been used very rarely, owing to the particular characteristics of the present topic, it may for practical purposes be the best among those available. If the purpose of the future instrument is to provide the States involved in a succession with a set of legal principles but at the same time with some recommendations to be followed by their legislators when drafting nationality laws, the form of a declaration adopted by the General Assembly may not only be sufficient for the achievement of this goal, but may even have some advantages, when compared to the rather rigid form of a convention, traditionally used for the finalization of the work of the International Law Commission.

As is often the case with draft articles submitted by the International Law Commission, the present articles are a combination of both existing rules of customary law and provisions aimed at developing international law. The element of development of international law is an indispensable part of the draft, which purports to cover the subject of nationality in relation to the succession of States in its entirety and to propose a legal regime more satisfactory than that which could be deduced from the already well-established principles of international law.

The declaration allows a broader spectrum of problems to be addressed than a convention establishing strictly binding obligations. It also makes irrelevant the discussion about whether its provisions may or may not be invoked vis-à-vis a new State which did not participate in its adoption. And finally, if adopted by consensus, it may acquire even higher authority than a convention ratified by just a small number of States. As a consequence, the real impact of a declaration on the behaviour of States may be more important than that of a convention awaiting ratification.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The Commission has left open the question of the final legal form to be given to the instrument. The Nordic countries have already stated their preference for a non-binding declaration which could be of immediate assistance to States dealing with problems of nationality in relation to a succession of States and, at the same time, would promote the further development of principles and norms of international law applicable to such problems. While the entry into force of a convention normally requires a lengthy period of time, a declaration of the General Assembly would provide an early and yet authoritative response to the need to have clear guidelines on the subject. The adoption of a declaration would not, on the other hand, preclude the elaboration of a convention on the same topic at a later stage.

France

It is essential to establish what approach is to be taken to the draft. No decision has as yet been taken as to what form the draft articles are ultimately to take.

Will the Commission's work lead to guidelines, which will serve as a reference tool for States, or to a binding legal instrument? As it stands, the text looks more like a draft convention. There is even a certain "legal mimicry" on the part of the draft articles with respect to the 1978 and 1983 Vienna Conventions, which increases already existing doubts as to the final status of the text ...

Nonetheless, attention should be paid to the "normative drift" to be seen in some articles. Is the draft to be categorized as codification of public international law or progressive development (which is not, in itself, open to criticism)? Article 20 is a good example: some of its provisions fall within the category of codification, while others, which emphasize the right of option, fall within the category of progressive development.

Does the draft fall within the sphere of *lex lata* or *lex ferenda*? Draft article 13 is clearly in the sphere of *lex ferenda* and not *lex lata*.

It would be problematical to reject the form of a treaty for a set of draft articles modifying rules of customary origin already applied by States. Should the treaty form not be chosen, one of the goals of codification — the drafting of new conventions — will not have been achieved. Furthermore, in such a case the rules enunciated in the draft are likely to have legal effects even though they are not treaty rules.

Switzerland

The distinction between codified customary rules and simple conventional rules is particularly important in the context of the succession of States. If the succession gives rise to one or more new actors on the international stage, they will be bound only by the provisions reflecting customary rules, i.e., those contained in Part I of the draft articles. States in existence before the succession are in a different situation, for if the draft articles take the form of a convention and if these States become parties to the convention, they will be bound by the entire text. In other words, different rules will apply to different States involved in one and the same succession. That being the case, the Commission appears well

advised to present its draft articles in the form of a declaration rather than as the text of a convention.[4]

Structure of the draft articles

Argentina

In general terms, Argentina agrees with the way the International Law Commission has organized the draft articles, dividing them into Part I on general principles and norms concerning nationality in relation to the succession of States and Part II on principles applicable in specific situations of succession of States.

Czech Republic

The structure of the draft articles follows that of the two Vienna Conventions on the Succession of States, the categorization of the succession itself being closer to the one adopted in the Vienna Convention of 1983. This approach is logical. While the provisions of Part I relate to all categories of succession of States, Part II shows differences in the application of some of the general principles to specific types of succession of States. Although Part I may not be considered in its entirety as a simple reflection of existing law — it also includes recommendations — the recommendatory nature is much more evident in Part II, which is mainly intended to provide guidance or inspiration to the States involved in a succession in their efforts to resolve problems of nationality. It is only wise to assume that States concerned may, by mutual agreement — whether explicit or even implicit — decide on a different technique of application of the provisions of Part I in their particular case of succession. With this proviso, the Czech Republic agrees with the general outline of the draft declaration.

Switzerland

The Swiss Government supports the idea of splitting the draft articles into two parts, the first stating general rules, and the second containing optional rules applicable to each of the four situations of succession defined in the draft articles. If article 19, the first article in Part II, is interpreted *a contrario*, the result is that Part I of the draft articles will consist of non-optional provisions. This suggests that the Commission considers that the provisions of Part I reflect existing customary law and, moreover, constitute peremptory rules (*jus cogens*). It would no doubt be desirable to review all the articles in Part I in order to establish whether they all do in fact have that status. The point is open to question. Articles 8 and 9, for example, are clearly optional; one may also wonder whether the rule attributing to a child who has no other nationality that of the State in whose territory he was born is a peremptory rule.

[4] See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (3) of the commentary to the preamble, p. 24.

Preamble

No comments were submitted on the preamble.

Part I. General provisions

Argentina

Argentina agrees on the adoption of the principles contained in Part I of the draft. It is particularly important, in cases of succession of States, to protect basic human rights, including the right to a nationality, to respect the will of persons concerned resulting from the exercise of the right of option under appropriate conditions, to state the fundamental obligation of States to prevent statelessness and the prohibition of discrimination and of arbitrary decisions, to provide for the protection of the rights of children and of the unity of a family, and so on. At the same time, Argentina agrees with the Commission's general approach, which is to preserve the legitimate interests of States in legislating on the matter, bearing in mind in particular that nationality is governed by domestic law within the limits established by international law.

Article 1. Right to a nationality

Argentina

Article 1 rightly enshrines, at the outset, the right of all persons to a nationality.

In this respect, it should be noted that article 20, paragraph 1, of the American Convention on Human Rights provides that every person has the right to a nationality. Along the same lines, the International Covenant on Civil and Political Rights, states in article 24, paragraph 3, that every child has the right to acquire a nationality.

In recognizing that every child has the right to a nationality, the Covenant establishes that such right is so important that everyone, from the earliest age, should have a nationality. This brings to light the very personal nature of the right to nationality, which is an expression of the right to personal identity.

Brunei Darussalam

The question of multiple nationality raises a number of difficulties for Brunei Darussalam, which does not subscribe to that concept or to that of dual citizenship.

Czech Republic

The Czech Republic supports the concept of the right to a nationality as defined in article 1. The principle that every person who prior to the succession of States had the nationality of the predecessor State has the right to the nationality of at least one of the States involved in such succession is a sound basis on which the draft as a whole is built. The issue here is not the right to a nationality *in abstracto*, but in the exclusive context of the

succession of States. Moreover, the right to a nationality is clearly subject to the provisions of the draft articles which follow.

The legislation of the Czech Republic and of Slovakia adopted in relation to the dissolution of Czechoslovakia, when considered jointly, provided the legal basis for the acquisition by each single national of the former Czechoslovakia of the nationality of one or the other successor State. The risk of statelessness was eliminated by the inclusion in the nationality laws of the two successor States of corresponding provisions concerning the basic criterion for the *ex lege* attribution of nationality. Thus, the result achieved by the application of these laws corresponded to the aim of articles 1 and 3 of the draft declaration. At the same time, it is worth noting that the nationality laws of the two successor States differed considerably in many respects, including the conditions for optional acquisition of nationality or the policy in matters such as dual nationality.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The Nordic countries are pleased to note that the Commission has not only reinforced the right to a nationality but has also given it a precise scope and applicability in article 1. The right to a nationality has already been incorporated in a number of international instruments. It was first stated in article 15 of the Universal Declaration of Human Rights of 1948. The International Covenant on Civil and Political Rights, as well as the Convention on the Rights of the Child stipulate that every child has the right to a nationality. The 1997 European Convention on Nationality embodies the right of everyone to a nationality as one of the principles on which the States parties shall base their domestic legislation on nationality.

Nevertheless, because of the difficulties in determining from which State such a right can be claimed, the right to a nationality has so far been viewed mainly as a positive formulation of the duty to avoid statelessness and not as a right to any particular nationality. The Commission's draft goes further than that, building on the fact that in cases of State succession the States concerned can be fairly easily identified. The Nordic countries support this reasoning.

The words "at least" in article 1 leave open the possibility of multiple nationality. Although this should not, according to the Commission, be interpreted as an encouragement of a policy of dual or multiple nationality, it is to be noted that from the point of view of the individuals concerned, dual nationality in most cases may be less detrimental an effect of a succession of States than statelessness. However, the Nordic countries share the view that determination of the particular circumstances in which multiple nationality may be desirable goes beyond the scope of a general declaration, and welcome the fact that the draft is intended to be neutral on this issue.

France

Article 1 gives the impression that the Commission is seeking to elaborate a text dealing not only with nationality but also with human rights. This article appears to reflect the aim of placing the draft articles in a "human rights perspective".

See also "General remarks", above.

Greece

While it is essential to establish the right to a nationality, it is questionable whether it is necessary to establish the right to at least one nationality.

Guatemala

Since article 1 contains terms which are defined in article 2, Guatemala believes that the order of the two articles should be reversed.

Italy

The right to a nationality in the context of a succession of States is established in article 1, which constitutes a fundamental rule of the draft. It also marks a significant advance in the international protection of human rights and an improvement in the positive sense of the principle embodied in article 15 of the Universal Declaration of Human Rights.

Switzerland

The rule in article 1 is acceptable in the view of the Swiss Government, even though it would appear difficult — except in the case of the unification of two States — to determine, among the States concerned, which one is under the obligation that corresponds to the right proclaimed in article 1.[5]

Article 2. Use of terms

Guatemala

See comments under article 1, above.

Switzerland

Article 2 of the draft contains a series of definitions, including the definition of the "person concerned" by a succession of States (subparagraph (f). Paragraph (6) of the commentary to this article, which concerns this term, contains a sentence which reads: "... stateless persons ... resident [in the absorbed territory] are in the same position as born nationals of the predecessor State."[6] Taken by itself, this sentence can be misleading and should be modified.

[5] Ibid., para. (2) of the commentary to article 1, pp. 28–29.
[6] Ibid., p. 32.

Article 3. Prevention of statelessness

Argentina

Argentina fully shares the interest of the international community in eradicating statelessness. That is why it ratified the 1954 Convention relating to the Status of Stateless Persons and the American Convention on Human Rights.

The American Convention states that every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality. It also establishes that no one shall be arbitrarily deprived of his nationality or of the right to change it (article 20, paras. 2 and 3).

Brunei Darussalam

The attribution by a State of its nationality is important to prevent statelessness resulting from a succession of States. However, it appears from the commentary that the attribution of nationality should remain the sole prerogative of the State concerned.

Czech Republic

See comments under article 1, above.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The obligation of States concerned to take all appropriate measures in order to prevent statelessness from arising is a corollary of the right to a nationality. With regard to article 3, it is noted that the restrictive criterion of habitual residence which was included in the corresponding principle (b) contained in the 1996 report of the Commission[7] has been deleted. The text as well as the objective of prevention of statelessness have benefited from this change. Moreover, the obligation to avoid statelessness has been concretized and made operational in several other articles, such as article 6, or the savings clauses in articles 7, 8 and 18.

France

Article 3 is satisfactory from the point of view of both form and substance.

Guatemala

In view of the definition of "person concerned" given in article 2 (f), it seems appropriate to replace, in article 3, the words "persons who, on the date of the succession of States, had the nationality of the predecessor State" by the term "persons concerned".

[7] Ibid., *Fifty-first Session, Supplement No. 10* (A/51/10), para. 86.

As a result of this change, the words "such succession" at the end of article 3 should be replaced with the words "the succession".

Italy

In order to invest the principle of the right to a nationality with the importance that it deserves, the Commission rightly included, *inter alia*, article 3. The obligation of the States involved in a succession to take all appropriate measures to prevent statelessness is a corollary of the right of the persons concerned to a nationality.

Switzerland

The links between article 3 and article 1 are obvious. Paragraph (6) of the commentary to article 3 stipulates that this article sets out an obligation of conduct, rather than one of result, in respect of the States concerned.[8] Given the difficulty in determining which State is bound by this obligation, one may ask whether article 3 ought not to be worded in terms of an *objective* to be attained rather than in terms of an obligation of conduct, at least if the form selected for the draft articles is that of a treaty.

See also comments under article 1, above.

Article 4. Presumption of nationality

Brunei Darussalam

According to the commentary to article 4, the purpose of this provision is "to address the problem of the time lag between the date of the succession of States and the adoption of legislation or, as the case may be, the conclusion of a treaty between States concerned on the question of the nationality of persons concerned following the succession".[9] The presumption of nationality in article 4 is a rebuttable presumption.[10]

The test of habitual residence goes beyond simply residing in the territory in question. There must be a genuine link between the person and the successor State, such as loyalty.

This article may be of some importance for Brunei Darussalam should some territories currently under another State's administration revert to Brunei Darussalam. The question of the nationality of the local population may also be a matter of concern to Brunei Darussalam.

Czech Republic

The Czech Republic has serious misgivings about the appropriateness of including article 4 in the draft articles, as well as about the rationale for this provision. It is true that

[8] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), p. 36.

[9] Ibid., para. (1) of the commentary to article 4, p. 37.

[10] Ibid., para. (2) of the commentary to article 4, p. 38.

the presumption reflected therein, as explained in the commentary, is a rebuttable one.[11] Nevertheless, it is open to question whether the inclusion of this article in Part I containing general provisions does not create more difficulties than it may resolve.

First, article 4 has clearly no "general" application. It makes no sense to invoke it in the case of the unification of States, where the principle according to which all persons concerned acquire the nationality of the successor State (see article 21) renders the distinction based on the place of residence within or outside the territory concerned useless.

Second, serious doubts may be raised about the function of such presumption in the case of the transfer of a part of the territory. No transfer can be lawfully accomplished other than by agreement between the States concerned. Such agreement will certainly address the issue of the nationality of persons having their habitual residence in the transferred territory. The presumption in article 4 has no meaning in this case. If the treaty provides for a change of nationality, the situation is clear. But it is also clear when the treaty remains silent on the question of nationality: in such case, the persons concerned retain their nationality. A recent example of this situation is the Treaty on the State border between the Czech Republic and Slovakia, which provided, among other things, for an exchange of certain territories between the two States. No automatic change of nationality was envisaged as a result of the territorial exchange.

Finally, the presumption envisaged in article 4 may not be helpful even in the cases of dissolution or separation. For example, in the case of the dissolution of a federal State or separation from a federal State of one of its component units, why should the citizenship of such unit recognized under the federal Constitution be disregarded and habitual residence be the only relevant criterion? The citizenship of a component unit of a federation is a reliable criterion for resolving the problem of nationality for those residing both inside and outside the territory concerned. On the contrary, the presumption based on habitual residence, although it may be easily applied to those living within the territory concerned, does not help to clarify the situation of those living abroad. In the case of the dissolution of a federation, this presumption would even create confusion.

Part II of the draft articles, in which the general provisions of Part I are applied to specific categories of succession of States, is to large extent based on the criterion of habitual residence. However, to suggest this criterion to the States concerned for their consideration — which is the purpose of Part II — is not the same as to formulate a presumption which would determine also the behaviour of third States. Accordingly, the International Law Commission should reconsider this problem in the light of the above comments.

Greece

See "General remarks", above.

Guatemala

Guatemala has serious doubts about the appropriateness of maintaining unchanged the presumption of nationality established by article 4. A natural, if not essential, aspect of the nationality of persons is the guarantee that no person possessing a nationality may

[11] Ibid.

lose it unless that person performs certain actions (commission of certain crimes, naturalization in a foreign country, renunciation, etc.). However, the presumption of nationality established by article 4, which can function only as a provisional nationality, would place its beneficiaries in the position of having a nationality which is subject to a decision independent of the will of the person concerned. The precariousness of this attribution of nationality will inevitably extend to such rights and advantages arising from that nationality as the person concerned may try to obtain by virtue of the possession of that nationality. As an example of this, let us imagine the case of a person who, by virtue of the presumed nationality attributed to him or her under article 4, assumes in the successor State a public office which, under the laws of that State, may be occupied only by a national. In principle, this person should be required to relinquish that office, if such person continues to occupy it, on the date on which the authorities of the successor State determine that such person does not, in fact, have the nationality he or she enjoyed by virtue of the presumption established in article 4. Is it permissible that a presumed nationality should give rise to such an outcome? Would this not violate the principle of acquired rights? To resolve difficulties of this type, the draft articles could stipulate that persons having a presumed nationality under article 4 should not enjoy, even provisionally, rights which might be exercised only by persons who normally and definitively had the nationality of the successor State. However, in this case, the presumed nationality under article 4 would be a mere fiction, since the only benefit it would provide would be the right to reside in the territory of the successor State, which persons concerned enjoy, in any case, under article 13. Alternatively, the opposite approach could be taken: the draft articles could provide that, if persons having the presumed nationality in question could, on the basis of that nationality, invoke acquired rights, then they should be allowed to become naturalized under particularly favourable conditions; or that if such persons must be allowed to opt for the nationality of the successor State in order to continue enjoying the acquired rights exercised by virtue of the presumption after having lost the benefit of the latter, then that right of option should enable them to do so. In any case, steps must be taken to prevent such difficulties from arising.

According to Part II, a successor State is obligated, in all cases, to attribute its nationality to the persons concerned who, at the time of succession, have their habitual residence in its territory (see articles 20, 21, 22 (a) and 24 (a)). It seems, then, that there is a general rule in this regard. However, this rule, which appears to follow from the rule established in article 4, is not set forth in Part I, as would seem appropriate. This may represent a lacuna in Part I that should be filled.

Italy

In order to invest the principle of the right to a nationality with the importance that it deserves, the Commission rightly included, *inter alia*, article 4.

The rebuttable presumption according to which nationality is derived from habitual residence constitutes a subsequent application of the principle of the need for a genuine link between the State and the individual in the sphere of naturalization. The legal relationship of nationality must not be based on formality or artifice but on a habitual link between the individual and the State. The criterion of habitual residence is one most frequently used in State succession to identify the initial population constituting the successor State.

Switzerland

See comments under article 12, below.

Article 5. Legislation concerning nationality and other connected issues

Argentina

Argentina agrees with the emphasis placed in article 5 on the need, in cases of succession, for the States concerned to enact without delay the relevant legislation to clarify the status of natural persons in regard to nationality and connected issues arising from the succession. It also agrees that measures should be taken to ensure that the persons concerned are duly informed about the effects of the legislation.

Some members of the Commission feel that this article should establish an obligation rather than merely making a recommendation.[12] Argentina supports that view and believes that the conditional form ("should") should be replaced by the imperative ("shall"), which is more appropriate for a legal norm.

Since nationality is a bond that is established by domestic law, it is up to each State to legislate on the acquisition, loss and reacquisition of nationality.

Under article 75, paragraph 12, of the Constitution of the Argentine Republic, Congress has the power to enact naturalization laws. Naturalization is regulated by Act No. 346 of 1869 and Regulatory Decree No. 3213/84 thereof.

It should be noted that the provisions of domestic law which govern nationality are recognized by other States to the extent that they do not affect international treaties or custom. This gives rise to many problems and conflicts in the area of nationality.

The principle of single nationality, i.e., the principle that each individual has one nationality, is enshrined in Argentine domestic law. Double or multiple nationality is derived from treaties. Thus, the Argentine Republic has concluded treaties on nationality with Sweden and Norway (1895), Italy (1971) and Spain (1979). It has ratified the Convention on the Nationality of Married Women (1933), the Convention relating to the Status of Stateless Persons (1954), the Convention on the Elimination of All Forms of Racial Discrimination (1967), the Convention on the Rights of the Child (1989) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

Brunei Darussalam

This article stresses the importance of domestic legislation as well as the need for States to enact legislation of which persons concerned may be apprised as soon as possible.

[12] Ibid., para. (6) of the commentary to article 5, pp. 41–42.

Czech Republic

The Czech legislation on nationality was adopted in parallel with the dissolution of Czechoslovakia itself and was in force on the very first day of the existence of the Czech Republic. The motives for such early legislation were the same as those which inspired article 5 of the draft, that is to avoid uncertainty, even if only temporary, as regards the status of persons concerned.

France

Although article 5 does not give rise to any substantive difficulties, some of the terms and expressions used in it should be changed or made clearer. For example, in the first sentence, the words "consistent with" should be replaced by the words "which will give effect to". Greater precision could be achieved by rewording the end of the second sentence, so that it reads "on their status and their conditions." Furthermore, the word "consequences" is too vague and should be replaced.

Switzerland

Article 5 stipulates that the States concerned "should", without undue delay, take legislative and other necessary measures in respect of nationality and other connected issues. The Swiss Government fails to see why this rule should take the form of a simple recommendation. Together with the minority on the Commission, it believes that article 5 must be worded in terms of an obligation,[13] particularly as this has been done in the case of article 11, concerning the unity of a family.

Article 6. Effective date

Brunei Darussalam

This article deals with the retroactive application of legislation, so as to avoid the possibility of a person becoming temporarily stateless during the process of succession. Given its purpose, there should not be any problem in accepting this article.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

See comments under article 3, above.

Greece

See "General remarks", above.

[13] Ibid.

Switzerland

According to article 6, the attribution of nationality takes effect on the date of the succession; in other words, it is usually retroactive. This retroactivity is also stipulated when the person concerned acquires a nationality by exercising a right of option, but only if, without retroactivity, the person would have been left temporarily stateless. The Swiss delegation wonders whether this latter condition should not be extended to all cases of attribution of nationality, i.e., to the whole of article 6, instead of being limited to the case of the exercise of a right of option. The suggested amendment would have the advantage of limiting the retroactivity to the extent strictly necessary.

Article 7. Attribution of nationality to persons concerned having their habitual residence in another State

Czech Republic

The International Law Commission took a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned. In this respect, the Czech Republic considers it essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

See comments under article 3, above.

France

States have a right to seek to prevent successions of States from leading to dual and multiple nationality. Article 7 reflects that aim.

...

The linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between these provisions is hard to understand.

See also "General remarks", above.

Guatemala

In the title of the article, it might be appropriate to change the word "Attribution" to "Non-attribution" (cf. the title of article 14). The drafting of paragraph 2, might be improved through the addition, immediately after the word "nationality", of the words "against their will" and the deletion of the words "against the will of the persons concerned" (see the French version of paragraph 2).

For reasons of logic, the following interrelated changes should be made to articles 7 and 10: at the beginning of article 7, paragraph 1, the words "Subject to the provisions of article 10" should be deleted and a reference to article 7 should be inserted at the beginning of article 10, paragraph 1, which would read: "Subject to the provisions of article 7, States concerned ..."

Switzerland

Article 7, paragraph 1, exempts the successor State from the obligation to attribute its nationality to persons having their habitual residence in another State and having the nationality of that State or a third State. The solution thus proposed is doubtless designed to reduce cases of dual nationality, even though the Commission claims to be neutral on this point. However, it places at a disadvantage those who, while having the nationality of a third State, also have "appropriate connections" other than residence with the successor State (family ties, for example). Still, to the extent that the successor State retains the *possibility* of offering its nationality to such individuals, the solution suggested in article 7, paragraph 1, would seem to be acceptable.

Article 8. Renunciation of the nationality of another State as a condition for attribution of nationality

Brunei Darussalam

This article provides a State with the possibility to impose the condition of renunciation of a former nationality as a prerequisite for granting its nationality. While the commentaries seem to imply that the draft is neutral on the question of dual/multiple nationality, the article allows States which have a policy of single nationality to enforce such a policy.

Czech Republic

The International Law Commission took a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned. In this respect, the Czech Republic considers it essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

See comments under article 3, above.

France

See "General remarks", above.

Greece

It would be worthwhile to exclude from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. Such is the case, in particular, with article 8 ..., which could be omitted from the draft.

See also "General remarks" above.

Article 9. Loss of nationality upon the voluntary acquisition of the nationality of another State

Czech Republic

The International Law Commission took a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned. In this respect, the Czech Republic considers it essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).

France

See "General remarks", above.

Greece

It would be worthwhile to exclude from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. Such is the case, in particular, with ... article 9 ..., which could be omitted from the draft.

See also "General remarks"above.

Switzerland

Article 9, paragraph 1, of the draft allows the predecessor State, if there is one, to withdraw its nationality from any of its nationals "who ... voluntarily acquire" the nationality of a successor State. According to paragraph 2, the successor State may in turn withdraw its nationality from persons who retain the nationality of the predecessor State. Paragraph (5) of the commentary to article 9 states that withdrawal cannot occur "before such persons effectively acquire the nationality" of the other State.[14] This stipulation is so warranted and so essential that it should be included in the actual text of the article.

[14] Ibid., para. (5) of the commentary to article 9, p. 49.

Article 10. Respect for the will of persons concerned

Argentina

Argentina considers it relevant that the will of the persons concerned by the succession of States should be duly taken into account and that such persons should be able to express their will through the exercise of the right of option.

The only nationality granted automatically under Argentine law is nationality by birth. Acquisition of nationality by option is voluntary and, like that of nationality by naturalization, involves a required procedure.

Brunei Darussalam

Paragraph 1 means that a person concerned is to be given a choice as to which *among* the nationalities of two or more States he or she wants. This does not seem to mean that such person has the right to choose two or more nationalities.

In paragraph 2, the meaning of the phrase "appropriate connection" is unclear. To what extent does a person need such "appropriate connection" with a State to be entitled to the nationality of that State?

Czech Republic

The International Law Commission took a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned. In this respect the Czech Republic considers it essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

Article 10 is among several articles which embody principles and rules that are intended to protect the human rights of the persons concerned. In general, these provisions take into consideration the current stage of development of human rights law.

France

The linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between these provisions is hard to understand.

...

Article 10, paragraph 4, would appear to be open to criticism as its provisions are too categorical. It would be preferable to say that the State whose nationality persons entitled to the right of option have renounced may withdraw its nationality from such persons only if they would thereby not become stateless.

See also "General remarks", above.

Greece

See "General remarks", above.

Guatemala

For reasons of logic, the following interrelated changes should be made to articles 7 and 10: at the beginning of article 7, paragraph 1, the words "Subject to the provisions of article 10" should be deleted, and a reference to article 7 should be inserted at the beginning of article 10, paragraph 1, which would read: "Subject to the provisions of article 7, States concerned ..."

Article 10, paragraph 3, is superfluous, in Guatemala's view, because it is practically tautological: it is unthinkable that a State could fail to attribute its nationality to a person who has exercised a right of option in favour of that nationality, since the exercise of this right and the attribution of nationality are two sides of the same coin.

Italy

Italy endorses the choices made by the Commission with respect to the role to be assigned to manifestations of the will of persons concerned in a succession of States as regards their choice of nationality. The provision contained in article 10 reflects a sufficiently well-established conventional and internal practice of States, especially in the cases of the formation of a new State and the cession of territory, which favours the residents of the territory in question or persons originating therein.

Article 11. Unity of a family

Brunei Darussalam

The principle reflected in article 11 seems to be sound, but there may be difficulties as to the definition and/or interpretation of the meaning of the term "family". It is desirable that family members should acquire the nationality of the head of the family. This can be foreseen in the case of infants and minors. But what about an extended family, e.g., including that of the eldest child who has married and has children?

Czech Republic

The Czech Republic supports the inclusion of this article.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

Article 11 is among several articles which embody principles and rules that are intended to protect the human rights of the persons concerned. In general, these provisions take into consideration the current stage of development of human rights law.

The Commission has rightly pointed out its commentary to article 11 that acquisition of different nationalities by the members of a family should not prevent them from remaining together or being reunited.[15] While it is highly desirable to enable members of a family to acquire the same nationality upon a succession of States, a change of nationality of one of the spouses during marriage should not automatically affect the nationality of the other spouse. Reference is made also to article 9 of the Convention on the Elimination of Discrimination Against Women, according to which a change of nationality by the husband during marriage shall not automatically change the nationality of the wife.

France

Article 11 would appear to have major implications regarding the law of residence, which is not in keeping with the aim of the draft. Although there is nothing jarring about this provision in substantive terms, it really has no place in the text.

Italy

Italy finds this provision particularly interesting. Article 11 goes beyond a common limit found in almost all international conventions and internal legislations on the matter providing for a simultaneous change of nationality of the family members at the time the family head changes his or her nationality. In most cases this solution entails discrimination against women, whose status is thus subordinate to that of men.

Article 12. Child born after the succession of States

Brunei Darussalam

From the commentary, it appears that the scope of this article is limited to the period directly following a succession of States. It is not clear for how much time after the succession this article is to apply.

Czech Republic

The Czech Republic supports the inclusion of article 12, the aim of which is in full harmony with the goal of the Convention on the Rights of the Child.

[15] Ibid., para. (5) of the commentary to article 11, p. 56.

France

Some provisions do not belong in the draft ... Article 12 seems to have a bias towards the principle of *jus soli*.

See also "General remarks", above.

Greece

It would be worth excluding from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. This is the case, in particular, with ... article 12 ..., which could be omitted from the draft.

See also "General remarks", above.

Italy

Italy finds this provision particularly interesting. Article 12 constitutes a useful development of article 24 of the International Covenant on Civil and Political Rights and of article 7 of the Convention on the Rights of the Child. The legal purpose of this rule is to invest the most difficult cases with a minimum of certainty in the determination and acquisition of a nationality by children involved in a succession of States.

Switzerland

Under the terms of article 12 of the draft, the child of a person concerned who is born after the succession and has not acquired any nationality has the right *jure soli* to the nationality of the State concerned on whose territory he or she was born. But does not this solution pose the risk, in certain cases, of a number of different nationalities within a single family? Given the presumption of nationality of the State of habitual residence set out in article 4, would it not be preferable to extend this notion to the situation envisioned in article 12, namely that of a child without nationality?

Article 13. Status of habitual residents

Czech Republic

Articles 13, 15 and 16 provide a set of guarantees for the respect of the rights of individuals and as such form a very useful part of the text.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The Nordic countries fully endorse the general principle, enshrined in paragraph 1, that the status of persons concerned as habitual residents should not be affected by the succession of States. The Commission may wish to consider whether it should be

complemented by a more specific provision on the right of residence, i.e., the right of habitual residents of the territory over which sovereignty is transferred to a successor State to remain in that State even if they have not acquired its nationality. A reference can be made in this context both to the Declaration on the Consequences of State Succession for the Nationality of Natural Persons, adopted by the European Commission for Democracy Through Law in 1996 (Venice Declaration),[16] according to which the exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein, as well as to article 20 of the European Convention on Nationality.[17]

France

Article 13 is clearly in the sphere of *lex ferenda* and not *lex lata* ... As it deals more with succession of States and the law of aliens than with nationality, it is not in keeping with the goal of the draft and does not belong in the text.

Italy

Italy finds this provision particularly interesting.

Switzerland

Article 13 provides that a succession of States shall not affect the status of persons concerned as habitual residents. The Commission's mandate, as it appears in the title of the draft articles, relates to the *nationality* of natural persons in relation to the succession of States; it does not cover their status as residents, notwithstanding the need to restrict as far as possible mass and forced shifts of population.

Article 14. Non-discrimination

Argentina

Both the American Convention on Human Rights and the International Covenant on Civil and Political Rights refer specifically to equality before the law and to the protection of ethnic, religious and linguistic minorities, thus prohibiting discrimination.

Argentina has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (1963) and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

[16] Council of Europe document CDL-NAT (96) 7 rev.

[17] See footnote 3 above.

Brunei Darussalam

The scope of this article is wide, as there is no specification of grounds for discrimination. There may be a need to narrow it if it is felt that the provision deals with issues broader than the scope of the topic itself.

Czech Republic

The Commission's commentary to article 14 contains a footnote with quite an extensive, but possibly misleading, reference to the requirement of a clear criminal record.[18] A much clearer distinction should be made between, on the one hand, the situation where this requirement would exist for the purposes of determining the nationality of natural persons directly and immediately as a result of a succession of States and where it might indeed prevent the person concerned from acquiring the nationality of at least one of the successor States, thus constituting discrimination, and, on the other hand, the entirely different situation where this requirement is one of the legitimate conditions for the naturalization of persons whose nationality had been determined prior to the succession of States. Such naturalization, regardless of whether it was sought in a third State or in another successor or predecessor State, is undoubtedly beyond the scope of the draft articles, even if it occurs in effect shortly after the succession.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

Article 14 is among several articles which embody principles and rules that are intended to protect the human rights of the persons concerned. In general, these provisions take into consideration the current stage of development of human rights law.

Greece

This article should be expanded to provide also for complete equality between new and long-term nationals in respect of their status and rights in general.

Italy

Italy finds this provision particularly interesting. Article 14 addresses one of the most important and certainly most difficult aspects of the protection of minorities, as already indicated by the Permanent Court of International Justice in connection with a dispute on the acquisition of Polish nationality.[19] On this point, Italy endorses the Commission's decision not to include an illustrative list of circumstances which might give rise to forms of discrimination but to opt instead for a general formula prohibiting discrimination regardless of the grounds therefor, in order to avoid the risk of any *a contrario* interpretation.

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[18] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), p. 62, footnote 98.

[19] Advisory opinion on the question of *Acquisition of Polish Nationality, P.C.I.J. 1923, Series B*, No. 7, p. 15.

Switzerland

Article 14 enjoins States not to discriminate "on any ground" in attributing or maintaining their nationality or when granting a right of option. As the Commission's commentary explains, this prohibition is directed in particular against discrimination on the grounds of sex, religion, race, origin or language, but in order to dispel the idea that, *a contrario*, any discrimination not included in such a list would be lawful, the Commission proposes to prohibit *all* discrimination regardless of its nature.[20] However, that formulation might be too broad. Might it not, for example, prohibit any distinction, in the acquisition of the nationality of a successor State, between persons residing in the territory of that State and other persons? In other words, the use of any such criterion for attribution of nationality might, if the current wording is retained, be deemed a discriminatory practice and, therefore, in contravention of article 14. The provision should be formulated more precisely, i.e., more narrowly.

Article 15. Prohibition of arbitrary decisions concerning nationality issues

Argentina

Article 20, paragraph 3, of the American Convention on Human Rights states that no one shall be arbitrarily deprived of his nationality or of the right to change it.

Under article 20 of the Constitution of the Argentine Republic, foreigners are not obliged to be naturalized, but they may do so if they meet the conditions established by law. This means that acquisition of Argentine nationality is a right, but not an obligation, for foreigners residing in the country. Foreign residents may be non-nationals of Argentina without prejudice to the exercise of their human rights, in the enjoyment of which they are on an equal footing with Argentine natives.

Brunei Darussalam

The purpose of this provision is to prevent abuses which may occur in the process of the application of legal instruments which in themselves are consistent with the draft articles.

Czech Republic

Articles 13, 15 and 16 provide a set of guarantees for the respect of the rights of individuals and as such form a very useful part of the text.

[20] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (3) of the commentary to article 14, p. 62.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

Article 15 is among several articles which embody principles and rules that are intended to protect the human rights of the persons concerned. In general, these provisions take into consideration the current stage of development of human rights law.

The Nordic countries wish to highlight the importance of the provisions on the prohibition of arbitrary decisions and on the procedures relating to nationality issues. It is only too often the case that treaty provisions or national citizenship laws which are generous on paper end up being considerably restricted in the phase of practical implementation. It is therefore important to expressly prohibit arbitrary decisions on nationality issues, as has been done in article 15, and to include procedural safeguards for the respect for the rule of law, such as the requirements in article 16 that decisions relating to nationality shall be issued in writing and shall be open to effective administrative or judicial review.

Italy

The rule contained in article 15 is yet another tool for protecting the right of every individual to a nationality.

Article 16. Procedures relating to nationality issues

Czech Republic

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Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The Nordic countries wish to highlight the importance of the provisions on the prohibition of arbitrary decisions and on the procedures relating to nationality issues. It is only too often the case that treaty provisions or national citizenship laws which are generous on paper end up being considerably restricted in the phase of practical implementation. It is therefore important to expressly prohibit arbitrary decisions on nationality issues, as has been done in article 15, and to include procedural safeguards for the respect for the rule of law, such as the requirements in article 16 that decisions relating to nationality shall be issued in writing and shall be open to effective administrative or judicial review.

Reasons for such decisions should preferably also be given in writing, which is the requirement contained in article 11 of the European Convention on Nationality. The element of "reasonable fees", contained in article 13 of the same Convention, could also be added.

France

Article 16 is too detailed. It would be preferable to say that States must "take appropriate measures to process without delay" the applications referred to in article 16.

Article 17. Exchange of information, consultation and negotiation

Czech Republic

Article 17, which provides for exchange of information, consultations and negotiations between States concerned, contains a reasonably drafted provision on negotiations and the conclusion of an agreement. Such an agreement is not an indispensable means of resolving problems concerning nationality. Legislative measures of one State adopted with full knowledge of the content of the legislation of the other State involved in a succession may suffice to prevent detrimental effects of such succession on nationality.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The obligation on the States concerned, as laid down in article 17, to exchange information and to consult in order to identify possible detrimental effects of the succession of States, and to seek a solution to eliminate or mitigate such effects, is a necessary corollary to the right to a nationality. As the Commission notes in its commentary, this obligation is instrumental in ensuring that the right to a nationality becomes an effective right.[21] It is obvious that article 17 should be read together with the other articles in the draft which are interrelated and give a content to the duty to consult and negotiate. Nonetheless, it would seem advisable to add a sentence stating explicitly that States concerned are also under the obligation to ensure that the outcome of the negotiations is in compliance with the principles and rules contained in the draft declaration.

Article 18. Other States

Czech Republic

The proposed wording of article 18 is satisfactory. Paragraph 1 reflects the general principle of non-opposability vis-à-vis third States of nationality granted without the existence of an effective link between the State and the person concerned. The proviso preventing the treatment of such person as a de facto stateless person is fully justified. Similarly, we understand the motives behind paragraph 2. It envisages the situation of persons who, despite the provisions of the draft articles, would become stateless. Paragraph 2 focuses exclusively on the relationship between these persons and a third State. Drafted in the form of a saving clause, this provision preserves the delicate balance between the interests of States which could be involved in a situation of this kind.

[21] Ibid., para. (4) of the commentary to article 17, p. 67.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

Even though it lies within the competence of each State to determine who will be its citizens, national laws and decisions will not necessarily have international effect. This is a principle clearly recognized in international law. According to the Hague Convention of 1930, such laws and decisions shall be recognized by other States only in so far as they are consistent with international conventions, international custom and generally recognized principles of law. Article 18, paragraph 1, basically restates this principle. As regards paragraph 2, however, it seems to have a wider application by giving third States a right to treat stateless persons as nationals of a given State even where statelessness can not be attributed to an act of the State but where the person concerned by his or her negligence contributed to the situation, provided that such treatment is beneficial to the person. The Nordic countries welcome the commentary that this provision is to be interpreted as meaning only that other States may extend to such persons a favourable treatment granted to nationals of the State in question. Consequently, they could not, for instance, deport these persons to that State.[22] The Commission may wish to consider whether the actual text of the draft articles can be further clarified in this respect.

See also comments under article 3, above.

France

Article 18, paragraph 1, which appears to authorize any State to contest the nationality granted to an individual by another State, is very questionable. Although, in its judgment rendered in 1955 in the *Nottebohm* case,[23] the International Court of Justice did indeed emphasize that nationality should be effective and that there should be a social connection between the State and the individual, the judgement in question has been criticized and has remained an isolated instance. The text in question contains an unfortunate extension of the principle of effectiveness. This extension appears to be based on the idea that a State must take an attribution of public international law as a basis for granting its nationality, whereas the opposite applies in practice.

Greece

It would be worth excluding from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. Such is the case, in particular, ... with article 18, which concerns an extremely delicate matter — control of States in respect of a competence which is strictly linked to their sovereignty — and is liable to raise more problems than it will resolve.

See also "General remarks", above.

[22] Ibid., para. (8) of the commentary to article 18, pp. 71–72.

[23] *I.C.J. Reports, 1955*, p. 4.

Guatemala

In view of the definition contained in article 2 (e), it might be appropriate to change the title of this article to "Third States".

Italy

In article 18, the Commission addresses with great clarity one of the key functions of international law in connection with nationality, i.e., delimiting the competence of States in this area. This provision is perfectly consistent with the line of legal logic followed throughout the draft articles and limits the possibility of invoking nationality against other States, a limit consisting of the existence of an effective link between the national and the State. The link of nationality is not merely a formal one but implies a shared life and shared interests and sentiments which establish a reciprocal interplay of rights and duties between a State and its national.

As in the case of the occupation of a territory, the consistent concern of international law is to ensure that legal characterizations correspond as closely as possible to actual reality.

The Commission does not in fact address the substance of the criteria for identifying the existence of an effective link, but that point is not included in its terms of reference, and in any event reliance on international jurisprudence (i.e. the *Nottebohm* case[24] and the *Flegenheimer* case[25]) can assist those called upon to deal with this issue.

Switzerland

Paragraph 2 of article 18 allows third States to treat persons who have become stateless as a result of a succession of States as nationals of the State whose nationality they would be entitled to acquire or retain. Paragraph (6) of the commentary to article 18 points out that this paragraph is designed to correct situations resulting from discriminatory legislation or an arbitrary decision prohibited by articles 14 and 15.[26] Switzerland would prefer that point to be made in the text of article 18, paragraph 2, with a reference to articles 14 and 15.

Part II. Provisions relating to specific categories of succession of States

Argentina

The Commission identified the following types of succession in practice: transfer of part of the territory; unification of States; dissolution of a State; separation of part or parts of the territory. Argentina supports the focus on, and treatment of, these aspects of the succession of States in the draft articles.

[24] Ibid.

[25] United Nations, *Reports of International Arbitral Awards*, vol. XIV, p. 327.

[26] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), p. 71.

In some cases, the principle of attribution of the nationality of successor States might imply the imposition of nationality without the consent of the person concerned. In order to make that principle more flexible, the Commission's draft permits the exercise of the right of option between the existing nationality and that of the successor State; there are various modalities for the exercise of this option.

It is important to respect the will of the persons concerned and to guarantee to the greatest possible extent their exercise of the right of option without discrimination or coercion. It is indeed essential to guarantee the legitimate interests of the inhabitants of a territory undergoing a succession of States and to respect their way of life. However, States' interest in limiting the risk of abuse of double or multiple nationality must also be taken into consideration in a balanced manner.

Argentina notes that the draft does not include a special section on cases of succession of States in relation to decolonization, as do the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

In this regard, Argentina holds the view that although the historical process of decolonization has, to a large extent, been completed, some colonial situations still remain, and that, as these situations are addressed, cases might arise in which it would be necessary to apply the rules on nationality of natural persons in relation to succession of States. Decolonization may take different forms, including the achievement of independence by non-self-governing territories, the restoration of the territorial integrity of another State or the division of the territory into several States. In any case, the different possibilities can be resolved satisfactorily by applying the principles and rules contained both in Part I of the draft articles and, to some extent, in Part II.

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The Nordic countries believe that Part II of the draft articles, intended to serve as practical guidelines for States who are in the process of enacting their legislation or negotiating treaties on nationality issues related to a succession of States, will indeed prove helpful in such situations. The Nordic countries also agree with the decision of the Commission to simplify the typology of the 1983 Vienna Convention on the Succession of States in respect of State Property, Archives and Debts by omitting the category of "Newly independent States". The provisions addressing one of the other four categories of State succession would be applicable in any remaining case of decolonization in the future. At the same time, the Commission has preserved the distinction between secession and dissolution while ensuring that the provisions in both sections are identical. These solutions are consistent with the pragmatic purpose of Part II, and can be endorsed as such.

France

Part II of the draft is dealt with more satisfactorily than Part II of the 1978 Convention on the Succession of States and Part II of the 1983 Convention on the Succession of States (for example, a clearer distinction is drawn between merger and absorption).

Italy

Part II of the draft articles regulates specific categories of succession of States, usually by following the choices already made in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

The categories of succession mentioned by the Commission are exhaustive, and Italy endorses its decision not to include cases of decolonization, both because of the uncertainty of the practice, which is often indistinguishable from the practice relating to other cases of succession, and because, since only a few cases of decolonization will occur in the future, it is preferable now to focus on the other categories. It should be borne in mind in this connection that categories of succession, which have been determined in theory, are often difficult to identify in practice and this factor might impair the effectiveness of the draft articles.

The solutions adopted in connection with the effects on nationality of specific cases of succession are entirely valid from the legal standpoint, for most of these solutions reflect current international practice or constitute the logical consequence — as in article 22, for example — of the dissolution of a State.

Italy also endorses the Commission's decision to use habitual residence instead of citizenship as the main criterion for identifying the persons to whom successor States must attribute their nationality. The criterion of residence, even if less used in practice, is more concrete than the criterion of citizenship; this decision is consistent with the tendency of international law to give preference to effectiveness.

Switzerland

In the view of the Swiss Government, the Commission was right not to separate cases of State succession from the specific phenomenon of decolonization, first because this distinction is irrelevant in the context of the nationality of natural persons and also because the decolonization process is nearly at an end.

Article 19. Application of Part II

Czech Republic

The provisions of Part II of the draft articles are aimed at applying the general principles of Part I to different categories of succession of States. The International Law Commission does not pretend to reflect here existing international law. Part II seems to be intended mainly as a source of inspiration for States concerned when, for example, they enter into negotiation in order to resolve nationality issues by agreement or when they are considering the adoption of national legislation for the purpose of resolving these issues. Such is at least the Czech Government's interpretation of article 19, in spite of the fact that the actual language of subsequent articles of Part II appears fairly strong (using the auxiliary verb "... shall ..."), as if binding rules were somehow laid down. This might actually be justified even in the framework of an instrument of a declaratory nature if general principles, for the most part soundly based on customary law, are involved, as is the case for Part I of the draft articles. Such language might however prove somewhat confusing and disturbing

in the context of Part II, and the Commission could perhaps reconsider whether article 19 is sufficient to dissipate any possible doubts in this respect.

Greece

One might wonder what the relationship is, from the legal point of view, between Parts I and II of the draft. Article 19 seems to give more weight to the provisions of Part I than to those of Part II. Thus article 10, paragraph 2, provides for granting the right of option only in the case of persons who would otherwise become stateless as a result of the succession, while articles 20, 23 and 26 seem to grant a much broader right of option. In such cases where there is a difference between the provisions of Part I and those of Part II, should States follow the general provisions or the specific provisions?

Guatemala

The substance and scope of article 19 are unclear. Unfortunately, the commentary to this article sheds little or no light on its meaning or usefulness. It appears that the article's purpose is to establish differences between the nature and functions of the provisions of Part II and those of Part I (whose provisions are referred to in article 19 as "*preceptos*" in the Spanish version). However, nothing is said about how the provisions of the two parts are to be differentiated. The various conventions, declarations and model rules adopted by United Nations bodies are of no help in clarifying the matter, since none of these texts establishes any differences between the various parts into which they are divided in terms of their nature or normative effects. What is clear is that, apart from article 27, which, as indicated in the commentary,[27] was placed only provisionally in Part II, the rules contained in Part I differ from those of Part II in that the provisions of the former are of a general nature, whereas those of the latter are specific. In this respect, the draft articles under consideration not only follow the pattern adopted in the 1978 and 1983 Vienna Conventions on the Succession of States, but also, with the exception of the specific category of "newly independent States", include the same specific categories of State succession as those two Conventions.

The differentiation established in both Conventions between a general part and a specific part is a characteristic of the corpora of codes with which jurists in the Romano-Germanic tradition are familiar, as it is standard in criminal law (where common law jurists are also cognizant of it) and in those parts of civil codes that concern contracts, which traditionally begin with a general part applicable to all contracts, followed by a part in which the various types of contracts are regulated individually.

However, in the various legal corpora mentioned above, whether national or international, this differentiation consists exclusively of the difference in degree of generality between the provisions in one part relative to those in the other. There is no difference, therefore, in the normative nature of the provisions in the two parts: those in the first part are as binding as those in the second. However, it is normal, with few exceptions, for the provisions in the second part, i.e., those that are specific, to be in harmony with those in the first part, i.e., those that are general.

[27] Ibid., para. (4) of the commentary to article 27, p. 93.

Moreover, there are no apparent differences between Part I and Part II of the draft articles in respect of provisions that actually or potentially pertain to customary law or *jus cogens*, or that constitute rules of progressive development of international law. In other words, rules of any of these types may be found in both Part I and Part II.

For all the foregoing reasons, article 19 should be deleted.

Section 1. Transfer of part of the territory

Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

Argentina

Doctrine and customary law recognize the general principle that when part of the territory of a State is transferred to another State, a change occurs with regard to the nationality of the inhabitants of the territory that has been incorporated or transferred, whereby they take on the nationality of the annexing or acquiring State. According to Podestá Costa, this is so because the annexing or acquiring State could not exercise sovereignty in a territory whose inhabitants belonged entirely to another political community.[28]

Brunei Darussalam

This provision deals with the situation where the person concerned may exercise his right of option to retain the nationality of the predecessor State even though his habitual place of residence is in the territory being ceded to another State. It does not seem to apply to the situation where nationals of the predecessor State having their habitual residence outside the territory transferred to the successor State want to change their nationality so as to acquire that of the successor State.

Czech Republic

The current text of article 20 could be usefully complemented by including a reference to the obligation of the predecessor State to withdraw its nationality from the persons concerned having their habitual residence in the transferred territory only after such persons acquire the nationality of the successor State. Obviously, this results from the State's obligation to prevent statelessness in accordance with article 3, but it is preferable to have an explicit clause to that effect, also in view of the fact that such explicit clause has found a place in article 25. Such addition could be drafted along the lines of article 25, paragraph 1, *in fine*.

[28] Luis A. Podestá Costa, *Derecho Internacional Público* (Tip. Editora Argentina, Buenos Aires, 1955), vol. I, p. 141.

France

Some of the provisions of article 20 fall within the category of codification, while others, which emphasize the right of option, fall within the category of progressive development.

...

The draft implies that an individual has the right to choose his or her nationality freely. The rights of States with respect to nationality, as compared with those of individuals, should not be limited unduly. Unlike in the case of the approach reflected in article 20, it is essential not to end up with "forum shopping" for nationality and to avoid the "privatization" of nationality, which disregards the public law status of nationality, a matter on which an individual is not free to decide. States must retain control over the attribution of nationality.

Greece

In the case of transfer of part of the territory, the right of option, in accordance with international practice, should be recognized only for persons who have effective links with the predecessor State. It is superfluous, or even naive, to seek to subject to the option procedure persons who have such links with the successor State.

See also "General remarks", above.

Guatemala

There seems to be no reason not to apply the same regime to the transfer of part of a State's territory as to the separation of part of a State's territory (sections 1 and 4, respectively, of Part II of the draft articles). In effect, the only two pertinent differences between transfer and separation are that (a) on transfer the successor State predates the succession, whereas on separation the successor State is born with the succession, and (b) on transfer only part of the successor State's territory is affected by the succession, whereas on separation the whole territory of the successor State is affected. Nevertheless, in the draft articles different regimes are applied to the two cases. This is obvious at first glance, given that the transfer of part of the territory of a State is governed by just one article, article 20, whereas three articles, articles 24, 25 and 26, apply to the separation of part or parts of the territory of a State. The latter establish a much broader and more complete regime than the one in article 20.

Guatemala therefore believes that article 20 should be deleted and replaced by three articles, provisionally numbered articles 20 A, 20 B and 20 C, which would differ from articles 24, 25 and 26 only in that the following slight adjustments would be made: (a) in the *chapeau* of article 24 (now numbered article 20 A), the words "part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist"would be replaced by the words "a State transfers part of its territory to another State", and the reference to "article 24" would change to "article 20 C"; (b) in article 25 (now renumbered as article 20 B), "article 24" and "article 26" would be replaced with "article 20 A" and "article 20 C", respectively; and (c) in article 26 (now renumbered as article 20 C), "articles 24 and 25" would be replaced with "articles 20 A and 20 B", respectively, and at the end of the article, the words "or of two or more successor States" would be deleted.

With these changes, not only would the overly succinct regime established by article 20 be expanded and improved, but this regime would now be comparable, *mutatis mutandis*, to the regime for the separation of parts of a State (as contained in articles 24, 25 and 26), which is reasonable.

Switzerland

Article 20 addresses the case of the transfer of only part of the territory of a State. It provides that the successor State must attribute its nationality to the persons who have their habitual residence in the transferred territory. At the same time, it guarantees such persons the right to opt for the nationality of the predecessor State. The granting of such a right of option would no doubt make it possible to respect the wishes of the individuals holding that right, but it would impose a heavy burden on the predecessor State. Furthermore, it might risk creating, in the transferred territory, a large population group holding the nationality of the predecessor State, a situation which seems undesirable. For that reason, the Swiss Government, together with some members of the Commission,[29] feels that the right of option granted by the predecessor State must be limited to persons who have retained links with the predecessor State. It might also be asked whether, for the sake of symmetry, the successor State should also be required to offer a right of option to nationals of the predecessor State who do not reside in the transferred territory but have links with that territory. Lastly, article 20 offers nothing to the persons concerned residing in the territory of third States. It would be desirable to allow such persons to acquire the nationality of the successor State if they have links with it.

Section 2. Unification of States

Article 21. Attribution of the nationality of the successor State

Greece

See "General remarks", above.

Section 3. Dissolution of a State

Article 22. Attribution of the nationality of the successor State

Brunei Darussalam

Brunei Darussalam considers that article 22 gives too much prominence to the criterion of habitual residence, in disregard of recent practice in Central and Eastern Europe where the primary criterion used was that of the nationality of the former units of federal States.

[29] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (5) of the commentary to article 20, p. 76.

France

The linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between these provisions is hard to understand.

Greece

See "General remarks", above.

Guatemala

The drafting of article 22 (b) (ii) could be improved by replacing "before leaving" with "on leaving" and deleting the word "last" before "habitual residence".

Italy

See general remarks under Part II above.

Switzerland

Switzerland wonders, without wishing to alter the substance of article 22, whether it would not be a good idea to combine the cases addressed in subparagraphs (b) (i) and (b) (ii).

Article 23. Granting of the right of option by the successor States

Czech Republic

Article 23 is not to be read as construing the right of option as the single acceptable means of dealing with the question of the nationality of persons qualified to acquire the nationality of several successor States under the criteria of article 22. This would undoubtedly go beyond *lex lata*, and article 19 (as well as article 10, paragraph 1) make it quite clear that the granting of the right of option in this case is merely suggested or proposed to States, not imposed on them. As a matter of fact, other possible alternative approaches are conceivable and do indeed exist concerning the specific issue of persons qualified to acquire the nationality of two or more successor States. These include measures such as negotiations among the States concerned with a view to determining a harmonized single superseding criterion, either the one mentioned in article 22 (a) or one taken from article 22 (b), or even adopting a unilateral choice of a superseding criterion (obviously in such case with the proviso of granting an appropriate right of option to persons concerned who would otherwise become stateless as a result of the succession of States, in conformity with article 10, paragraph 2). Recent practice in the area of State succession has shown that a variety of such systems could work satisfactorily while being at the same time fully consistent with the fundamental protective principles set forth in Part I. Moreover, it can

be pointed out in this respect that the Commission, in its commentary to article 10, paragraph 1, on the will of persons concerned stated that the "expression 'shall give consideration' implies that there is no strict obligation to grant a right of option to this category of persons concerned."[30] From a *de lege lata* perspective, it is therefore indisputable that international law tolerates more flexibility than article 22 together with article 23, paragraph 1, seem to admit, and it is the understanding of the Czech Republic that article 19 indeed recognizes the greater flexibility for applying the principles of Part I to specific situations, including the one envisaged in section 3.

After careful consideration, the Czech Republic however considers that *de lege ferenda* it might be utterly desirable, with respect to persons *a priori* qualified to acquire several nationalities, to promote the right of option, as the most efficient means to address the issue at hand while integrating to the fullest extent possible its human rights dimension.

In view of these considerations and also bearing in mind the indicative nature of Part II as provided for in article 19, the Czech Republic supports the text of article 23 in its current wording as a step in the right direction and a laudable attempt on the part of the Commission at the progressive development of international law.

France

The linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions is hard to understand.

Greece

It is difficult to evaluate the right of option established under article 23, paragraph 1, because it depends on unknown factors which are exclusively a matter of the domestic law of the States concerned.

Guatemala

If interpreted in an absolutely literal manner, article 23, paragraph 1, not only obliges successor States to grant a right of option to persons concerned who are qualified to acquire their nationality, it obliges all other successor States to grant that option as well. To eliminate this obvious absurdity, paragraph 1 should be worded as follows: "In cases where persons concerned covered by article 22 meet the conditions for acquiring the nationality of one or more successor States, those States shall grant a right of option to those persons." This change, however, is not sufficient. We believe that the "conditions" mentioned in paragraph 1 cannot be any other than those set out in article 22. However, if once again the paragraph is taken literally, it implies that these are different conditions. To prevent giving this false impression, a second change should be made in paragraph 1, which would then read as follows: "If under article 22 the nationality of two or more successor States is attributable to persons concerned, those States shall grant a right of option to those persons."

[30] Ibid., para. (8) of the commentary to article 10, p. 52.

Section 4. Separation of part or parts of the territory

Article 24. Attribution of the nationality of the successor State

Brunei Darussalam

The meaning and scope of the phrases "appropriate legal connection" and "any other appropriate connection" are not really clear.

Greece

See "General remarks", above.

Guatemala

The drafting of article 24 (b) (ii) could be improved by replacing "before leaving" with "on leaving" and deleting the word "last" before "habitual residence".

Switzerland

Switzerland wonders, without wishing to alter the substance of the provision, whether it would not be a good idea to combine the cases addressed in subparagraphs (b) (i) and (b) (ii).

Article 25. Withdrawal of the nationality of the predecessor State

Brunei Darussalam

Article 25 gives the option to the predecessor State to withdraw its nationality from persons who have acquired the nationality of the successor State. Again, the meaning and scope of the phrases "appropriate legal connection"and "any other appropriate connection" is not really clear.

Greece

It would be worth excluding from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. Such is the case, in particular, with ... article 25, paragraph 2, which could be omitted from the draft.

See also "General remarks", above.

Article 26. Granting of the right of option by the predecessor and the successor States

Argentina

Argentina considers that this provision is sound, and its inclusion in the draft is relevant. With regard to its position in the draft, it might be inserted in Part I during the second reading.

Czech Republic

The above comments pertaining to article 23 of section 3 apply *mutatis mutandis* to article 26 of section 4.

Greece

It is difficult to evaluate the right of option established under article 26, because it depends upon unknown factors which are exclusively a matter of the domestic law of the States concerned. Moreover, it seems excessive to subject the persons envisaged in article 25, paragraph 2, to an option procedure.

Article 27. Cases of succession of States covered by the present draft articles

Finland, on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland)

The provision limiting the application of the draft articles, in line with both Vienna Conventions on the Succession of States, to successions of States occurring in conformity with international law is from a general point of view a welcome addition. The inclusion of the phrase "Without prejudice to the right to a nationality of persons concerned", however, may give rise to conflicting interpretations and could perhaps be revisited.

It is understood that a decision on the final placement of the article in Part I will be taken subsequently.

Greece

The phrase "Without prejudice to the right to a nationality of person concerned" is unacceptable from all points of view. Even if the International Law Commission wished to make the right to a nationality a rule of *jus cogens*, that right could not have a place in the context of article 27, which actually envisages the case of an international crime, a situation that allows for no exceptions.

Switzerland

Switzerland believes that article 27, which defines the scope of the draft articles, including the scope of the general provisions (articles 1–18), should be placed at the beginning of the text. It also shares the view of some members of the Commission who feel that the opening phrase of the article renders the entire article ambiguous,[31] and considers that a provision of an international treaty or declaration by the General Assembly must be intelligible without the reader's having to study the case law of the International Court of Justice.

III. Comments and observations received from Governments on the question of the nationality of legal persons in relation to the succession of States

Greece

With regard to the effects of the succession of States on the nationality of legal persons, Greece is awaiting with interest the initial results of the work of the International Law Commission on this issue, which has been little studied up to now at the international level. This study should be based mainly on the practice of States which have recently experienced cases of succession.

[31] Ibid., para. (3) of the commentary to article 27, p. 93.